Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1992

AURELIA SCHOLAR,

*Petitioner,*

v.

PACIFIC BELL, a Pacific Telesis Company, a corporation,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a *pro se* Title VII action was timely under 42 U.S.C. § 2000e-5(f)(1) when it was filed within 90 days of the plaintiff's personal receipt of the Equal Employment Opportunity Commission's right-to-sue notice but 93 days after the notice was delivered to her home, where it was signed for, misplaced, and forgotten by a visiting family member.

2. Whether the doctrine of equitable tolling applies in the circumstances described above, when the *pro se* plaintiff was relying on a letter from the EEOC, which stated that any lawsuit must be filed "within 90 days of the date you received the determination."

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PACIFIC BELL, a Pacific Telesis Company, a corporation,

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Aurelia Scholar respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto and is unofficially reported at 58 Fair Empl.Prac.Cas. (BNA) 1248 and at 58 Empl. Prac. Guide (CCH) ¶41,440. The District

Court opinion is unofficially reported at 58 Fair Empl.Prac.Cas. (BNA) 1243.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1992 and was reprinted with corrections on May 7, 1992. This petition for certiorari was filed within 90 days of April 30, 1992. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

## STATEMENT OF THE CASE

Petitioner Aurelia Scholar filed a timely charge of national origin discrimination against her employer of 17 years, respondent Pacific Bell. On October 26, 1988, the Equal Employment Opportunity Commission (EEOC) sent Ms. Scholar a form right-to-sue letter by certified

mail, stating that it was dismissing her charge because the evidence did not establish a violation of the statute. The letter continued, "IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST." An accompanying information sheet on "Filing Suit in Federal District Court under Title VII" declared that any lawsuit must be filed "within 90 days of the date you received the determination." (Appendix, p. 12)

The EEOC's right-to-sue letter and information sheet were delivered to Ms. Scholar's home on November 1, 1988. Ms. Scholar was not at home at the time and her daughter Laurene, who was visiting, signed the return receipt. Laurene did not give or mention the materials to her mother, and forgot where she had placed them. The record does not reveal Laurene's age. (Appendix, p. 5; Clerk's Record [CR] 64)

Ms. Scholar came across the EEOC letter and information sheet several days later although she did not remember the exact date. At the time she was under heavy sedation for depression attributable to her employer's discriminatory treatment. Based on her psychiatrist's declaration, which stated that Ms. Scholar first mentioned the EEOC letter in her weekly treatment session on November 15, 1988 and had not mentioned it at the session on November 8 and that "it would have been inconceivable for her not to have talked about it upon receipt," it can reasonably be determined that she personally received the materials between November 9 and 15, 1988. (Appendix, p. 8; CR 55, 56 ¶15)

Ms. Scholar filed her Title VII action *in propria persona* on February 2, 1989. (CR 1) This was 93 days after delivery of the right-to-sue letter to her home but only 85 days after the earliest date on which she could have personally received it.

Respondent Pacific Bell filed a motion for summary judgment, asserting *inter alia* that the action was untimely. The district court granted the motion on other grounds, without ruling on the timeliness issue. The Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment on the ground that Ms. Scholar's Title VII action was filed after the 90-day statute of limitations had expired and she had made no showing to justify invocation of the doctrine of equitable tolling. (Appendix, pp. 4-8)

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 2000e-5(f)(1).

The Courts of Appeals are split on the issue raised by this case. The Seventh Circuit holds that the time to file runs from the date that the claimant personally received the right-to-sue letter, not the date it was delivered to his or her household. Thus, in *Archie v. Chicago Truck Drivers*, 585 F.2d 210 (7th Cir. 1978), the Seventh Circuit held that a *pro se* Title VII action was timely when it was filed 91 days after the EEOC letter was signed for by the

plaintiff's wife but 82 days from the date the plaintiff actually received the notice.

By contrast, the Fourth, Fifth, Eleventh, and now the Ninth Circuits hold that delivery to the household, rather than personal receipt by the discriminatee, starts the 90-day statute of limitations running. *Harvey v. City of New Bern Police Dep't.*, 813 F.2d 652 (4th Cir. 1987); *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247 (5th Cir. 1985); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983).

The courts of appeals for the other circuits have not squarely ruled on this issue although they have decided related questions. *See, e.g., Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472 (6th Cir. 1986) [where claimant fails to notify EEOC of address change, time starts to run five days after EEOC mails right-to-sue letter to claimant's address of record].

The Ninth Circuit's reasoning in the instant case conflicts with that of the Seventh Circuit in *Archie* in several major respects.

First, the Ninth Circuit held that the statutory language mandated that the 90-day period run from delivery to the household. It reasoned, "The language of the statute establishes the 90-day period as running from the 'giving of such notice' rather than from the date claimant actually 'receives' notice in hand. 42 U.S.C. § 2000e-5(f)(1)." (Appendix, p. 7) Sidestepping its own decision in an earlier case, in which it held that the "giving of such notice" required "receipt" and "actual notification" before the 90-day period began to run (*Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286, n.3 (9th Cir. 1977)), the court concluded that notice was "given" when

the right-to-sue letter was delivered to Ms. Scholar's residence and signed for by her daughter.

By contrast, the Seventh Circuit in *Archie* held that the "giving of such notice" language had to be liberally interpreted in light of the remedial purpose of Title VII. "Were we to read the doctrine of constructive receipt into the language of 42 U.S.C. § 2000e-5(f)(1), we would be 'condition[ing] a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute,'" the court stated. The purpose of the right-to-sue notice is to provide the claimant with formal notification that his or her administrative remedies have been exhausted and that the time to bring suit has begun to run, the court noted. This purpose has not been accomplished unless the claimant is actually aware of the right-to-sue letter. "[T]he claimant can hardly be said to have slept on his rights if he allowed the . . . period to expire in ignorance of *his right* to sue," the court stated (585 F.2d at 215-216, emphasis by the court), quoting *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976).[1]

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[1] In *Franks v. Bowman Transp. Co., supra*, the right-to-sue letter was received at Franks' mailing address by Franks' nine year old nephew, who lost the letter before Franks saw or read it. Approximately a year later, Franks contacted the EEOC and learned of the letter's delivery. The EEOC issued a new letter and Franks filed suit shortly thereafter. The Fifth Circuit held that, where "it is shown that the claimant through no fault of his own has failed to receive the suit letter . . . the delivery of the letter to the mailing address cannot be considered to constitute statutory notification." (495 F.2d at 405)

(Continued on following page)

The Ninth Circuit in the instant case also disagreed with the Seventh Circuit concerning the importance of establishing a "bright-line" date for the start of the 90-day filing period. The Ninth Circuit stated that " '[t]here is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless.' " (Appendix, p. 8, quoting *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982)).

The Seventh Circuit did not share such fears. In *Archie*, the court pointed out that the EEOC could avoid such a problem by authorizing delivery of right-to-sue notices only to the named recipients. If the agency did not take that approach, the district courts are "well able" to undertake the duty of fact-finding with regard to the date of actual receipt of the notice by a plaintiff, the court held. (585 F.2d at 216).

In the instant case, the Ninth Circuit recognized that its approach clashed with that of the Seventh Circuit in *Archie* but distinguished *Archie* on the ground that it was decided when the 90-day requirement was thought to be a jurisdictional prerequisite, not a statute of limitations. (Appendix, p. 6, n.3) That distinction does not hold water. The Seventh Circuit has reaffirmed its holding in

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(Continued from previous page)

More recently, the Fifth Circuit has limited *Franks* to its facts, holding that the 90-day filing period commences when the EEOC letter is delivered to the household if the claimant actually receives it at some later date. *Espinoza v. Missouri Pacific R. Co., supra*, 754 F.2d 1247.

*Archie* after recognizing that the 90-day limit is not jurisdictional. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316-1317 and n.2 (7th Cir. 1984).

Thus, the Ninth Circuit's holding in the instant case squarely conflicts with the decision of the Seventh Circuit. This head-on conflict justifies the grant of certiorari to review the judgment below.

## 2. THE DECISION BELOW RAISES IMPORTANT AND RECURRING PROBLEMS CONCERNING THE INITIATION OF A PRIVATE-SECTOR TITLE VII ACTION.

This Court has repeatedly granted certiorari to clarify the procedural requirements for initiation of a Title VII action. Less than two years ago, in *Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S.Ct. 453 (1990), a federal-sector Title VII action, the Court determined when the 30-day period under § 2000e-16(c) begins to run where the right-to-sue notice was delivered to the claimant's attorney. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court decided whether the time to file an individual Title VII action was tolled during the pendency of a class action where the individual claimant was a member of the class. In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the Court considered whether filing of the right-to-sue letter with the district court constituted the commencement of a Title VII action.

The instant case potentially affects many thousands of persons, far more than *Irwin*, *Crown, Cork & Seal* or *Baldwin County Welcome Center*. In fiscal year 1991, for example, the EEOC issued 40,583 right-to-sue notices

based on charges filed against non-federal defendants. (Search of EEOC Charge Data System, Office of Program Operations (July 3, 1992)). That year, 7,089 Title VII actions were filed against such defendants. (Search of Statistical Analysis and Reports Division Data Base, Administrative Office of the U.S. Courts (July 14, 1992)). The question of when the 90-day period begins to run potentially impacted each of those cases.

The importance and recurring significance of this issue are evident from the number of decisions on this question. Five of the 12 circuits have ruled on this issue, some in repeated cases. *See* cases cited at pp. 4-5, *supra; see also, Bell v. Eagle Motor Lines, Inc.*, 693 F.2d 1086 (11th Cir. 1982). District courts have also confronted the point in numerous cases, with differing results. *See, e.g., Oswald v. Veeder Root Co.*, 662 F.Supp. 952 (W.D.Pa. 1987) [statute runs from delivery to plaintiff's address]; *Sanderlin v. La Petite Academy, Inc.*, 637 F.Supp. 1166 (E.D.Va. 1986) [same]; *Crofffut v. United Parcel Service, Inc.*, 575 F.Supp. 1264 (E.D.Mo. 1984) [statute runs from actual receipt by plaintiff]; *Killingham v. Board of Governors*, 549 F.Supp. 225 (N.D.Ill. 1982) [same]; *Fletcher v. Royston*, 30 Fair Empl.Prac.Cas. (BNA) 286, 290 (D.D.C. 1982) [same]; *Scarlett v. Seaboard Coast Line R.R. Co.*, 27 Fair Empl.Prac.Cas. (BNA) 624, 628 (S.D.Ga. 1977) [same].

Surprisingly, neither the Ninth Circuit nor the many other courts which have ruled on this issue have properly focused on the critical statutory language in section 2000e-5(f)(1): "the Commission . . . *shall so notify the person aggrieved* and within ninety days after the *giving of such notice* a civil action may be brought. . . . " Thus, the statute itself prescribes that the 90-day period begins to

run only after notice is given to "the person aggrieved." *Cf. Irwin v. Veterans Admin., supra,* 111 S.Ct. at 456 [§ 2000e-16(c) specifies that EEOC notification letter be "received" but does not specify by the claimant]. This critical failure in statutory analysis should be rectified by this Court.

Should the Court conclude that the 90-day period runs from delivery to the household, then applicability of the doctrine of equitable tolling would be an important question in this case, as it was in *Irwin* and *Baldwin County Welcome Center.* The EEOC's right-to-sue letter to Ms. Scholar stated, "IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO *WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION;* OTHERWISE THE RIGHT TO SUE IS LOST." (Appendix, pp. 10-11, emphasis added) This vague and confusing use of the word "receipt" was made affirmatively misleading by the accompanying one-page information sheet, which provided: "Should you wish to pursue this matter further, you may do so by filing a lawsuit . . . *within 90 days of the date you received the determination.*" (Appendix, p. 12; emphasis added)[2] Neither the Ninth Circuit in this case, nor any other circuit or district court, has ruled on whether a *pro se* plaintiff's reliance on this official

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[2] The form letter currently prescribed for use when the Commission dismisses a charge for lack of evidence of a violation states, "THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT . . . WITHIN 90 DAYS OF THE *CHARGING PARTY'S RECEIPT* OF THIS LETTER." EEOC Compliance Manual (CCH) p. 372, emphasis added.

mis-advice provides a basis for applying the doctrine of equitable tolling. *Cf. Baldwin County Welcome Center v. Brown, supra,* 466 U.S. at 151 ["This is not a case in which a claimant has received inadequate notice. . . . "].[3]

## CONCLUSION

For these reasons, a writ of certioari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[3] The Ninth Circuit ignored these misleading letters in holding that Ms. Scholar had not made a showing to justify invocation of equitable tolling. The court stated that, even accepting Ms. Scholar's factual assertions as true, she had 76-83 days in which to file suit and she had offered "no explanation as to why this was not sufficient time in which to commence her action." (Appendix, p. 8) However, since the EEOC told Ms. Scholar that she could sue within 90 days from *her receipt* of the right-to-sue letter, this Court could apply equitable tolling to give Ms. Scholar the full period promised by the EEOC.

REPRINTED WITH CORRECTIONS MAY 7, 1992

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| AURELIA SCHOLAR,<br>*Plaintiff/Appellant,*<br>v.<br>PACIFIC BELL,<br>A Pacific Telesis<br>Company, a corporation,<br>*Defendant/Appellee* | No. 90-15939<br>D.C. No.<br>C 89-0309 DLJ<br>OPINION |

Appeal from the United States District Court
For the Northern District of California
D.Lowell Jensen, District Judge, Presiding

Argued and Submitted
October 9, 1991 – San Francisco, California

Filed April 30, 1992

Before: Thomas Tang and Stephen S. Trott, Circuit Judges, and James M. Burns,* Senior District Judge.

Opinion by Judge Burns

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* The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

## COUNSEL

Ellen Lake, Oakland, California, for the plaintiff/appellant. Margaret deB. Brown, Sarah J. Diehl, Mary Lu Christie, Pacific Bell, San Francisco, California, for the defendant/appellee.

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## OPINION

BURNS, Senior District Judge:

Ms. Scholar appeals the district court's grant of summary judgment to Pacific Bell and dismissal of her claims for relief arising from alleged discriminatory employment practices by Pacific Bell. Ms. Scholar also appeals the district court's denial of her motion for leave to file a second amended complaint.

We have jurisdiction under 28 U.S.C. § 1291 (1988).

### *BACKGROUND*

Ms. Scholar was an employee of Pacific Bell and its predecessor entity for approximately 17 years. She was employed in nonsalaried, nonmanagement positions governed by collective bargaining agreements. In 1980 Ms. Scholar's name was included in Pacific Bell's "Ready Now" Binder, a list of nonsalaried employees selected by their supervisors as candidates for promotion to management as positions became available. Although Ms. Scholar was never promoted to a management position during her long tenure with Pacific Bell, she does not

challenge Pacific Bell's employment practices prior to the events triggering this dispute.

In 1986 employees listed in the Ready Now Binder were reevaluated. Ms. Scholar's name was removed from the binder in 1987 following a fresh performance evaluation by her immediate supervisor; review of her employment record and current evaluation by the district's five engineering managers; and approval of the reviewers' decision by Arthur Scholar, District Manager and husband of Ms. Scholar. In 1988 Ms. Scholar took disability retirement. On February 2, 1989, she brought this action against Pacific Bell to recover back pay and to obtain contract damages and reinstatement to the management position she believes she should have had based on merit.

The district court granted Pacific Bell's motion for summary judgment on the grounds that federal labor law preempted Ms. Scholar's claim for breach of an implied-in-fact employment contract under state law and that no evidence of disparate treatment was established. The district court also denied Ms. Scholar's motion for leave to file a second amended complaint on the grounds that adding a claim of racial discrimination pursuant to 42 U.S.C. § 1981 (1988) would be repetitive of the claims already stated and, therefore, futile.

*STANDARD OF REVIEW*

A grant of summary judgment is reviewed *de novo*, *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). The

appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986).

A district court's decision to deny leave to amend a pleading is reviewed for abuse of discretion. *Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Serv. Bureau,* 701 F.2d 1276, 1292 (9th Cir.) *cert. denied,* 464 U.S. 822 (1983).

*DISCUSSION*

Although the district court did not grant summary judgment to respondent based on Ms. Scholar's failure to file her cause of action within the statutory time limit, we can affirm "on any ground supported by the record, provided the parties have had the opportunity to discuss it in their briefs." *Paskaly v. Seale,* 506 F.2d 1209, 1211 n.4 (9th Cir. 1974). *See also Lakeview Dev. Corp. v. City of South Lake Tahoe,* 915 F.2d 1290, 1299 (9th Cir. 1990), *cert. denied,* 111 S.Ct. 2890 (1991). Ms. Scholar's failure to file her Title VII action within the prescribed statutory period was raised in Pacific Bell's motion for summary judgment and presented to this court in the parties' briefs; counsel also devoted substantial time to the topic in oral argument before this court. We, therefore, affirm the district court's grant of summary judgment to respondent on the grounds that Ms. Scholar's failure to file her Title VII claim within the time limits prescribed by statute bars this action.

When the Equal Employment Opportunity Commission (EEOC) dismisses a claim, it is required to notify claimant and to inform claimant that she has 90 days to

bring a civil action, 42 U.S.C. § 2000e-5(f)(1) (1988).[1] The requirement for filing a Title VII civil action within 90 days from the date EEOC dismisses a claim constitutes a statute of limitations. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445 (9th Cir. 1990). If claimant fails to file within the 90-day period, the action is barred accordingly. *Id.*

On October 26, 1988, EEOC sent Ms. Scholar a letter by certified mail informing her it had dismissed her claim and that she had 90 days from receipt of the letter to file a civil action. EEOC's "right-to-sue" letter was received at Ms. Scholar's house on November 1, 1988, and the return receipt was signed by her daughter. Ms. Scholar contends she did not personally see the letter until a few days later; the 90-day period did not begin to run until she personally received the letter; and, therefore, the civil action she filed February 2, 1989, was timely. For these reasons, Ms. Scholar argues we should return her case to the district court for a full trial. We reject this argument.

This court has not specifically addressed the issue of timeliness in filing a Title VII civil action under the fact

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[1] 42 U.S.C. § 2000e-5(f)(1) provides in part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . .

scenario at hand;[2] however, we agree with the reasoning of the Fourth, Fifth, and Eleventh Circuits.[3] *See Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 653-54 (4th Cir. 1987) (court held 90-day period began when EEOC's right-to-sue letter was received by claimant's wife even though claimant did not learn of letter until six days later); *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247, 1248-50 (5th Cir. 1985) (court held 90-day period began when EEOC's right-to-sue letter was received by claimant's wife even though claimant did not learn about the letter until he returned from out of town eight days later); and *Law v. Hercules, Inc.*, 713 F.2d 691, 692-93 (11th Cir. 1983) (court held 90-day period began when claimant's 17-year-old son signed return receipt for EEOC's right-to-

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[2] Ms. Scholar contends this court indicated its interpretation of notice as it applies to 42 U.S.C. § 2000e-5(f)(1) when it stated in a footnote to *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286 n.3 (9th Cir. 1977), that "actual notification" of the 90-day period is required. In the footnote to *Lynn* the court was addressing the fact that the 90-day period begins to run when claimant receives the right-to-sue letter rather than when the letter is dispatched; the court's comments were not made in the context of the facts before us.

[3] Ms. Scholar relies upon *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976), and *Archie v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 585 F.2d 210 (7th Cir. 1978), *inter alia*, to support her position. The Fifth Circuit, however, distinguishes both *Franks* (one of its own cases) and *Archie* by pointing out that both cases were decided before it was determined that the 90-day requirement was a statute of limitation rather than a jurisdictional prerequisite, *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985).

sue letter in spite of claimant's contention he did not see the letter until one or two days later).

The language of the statute establishes the 90-day period as running from the "giving of such notice" rather than from the date claimant actually "receives" notice in hand, 42 U.S.C. § 2000e-5(f)(1). *See also Espinoza*, 754 F.2d at 1248-50. Ms. Scholar was given notice when the right-to-sue letter sent certified mail by EEOC was received and signed for by Ms. Scholar's daughter November 1, 1988, at Ms. Scholar's place of residence; thus, expiration of the 90-day period was January 30, 1989. Ms. Scholar acknowledges she read the letter a few days after it was delivered to her home and that she understood its contents. Ms. Scholar filed this civil action February 2, 1989, three days after the statute of limitations expired.

A statute of limitation is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis. *See Harvey*, 813 F.2d at 654. *See also Espinoza*, 754 F.2d at 1250. The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire, and when the EEOC's notice of the statutory period was clearly inadequate. *See Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S.Ct. 453, 457-58 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam). Courts have been generally

unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights." *Irwin*, 111 S.Ct. at 458. We find this to be the case here.

Ms. Scholar contends she learned of the letter some time between November 8 and November 15, 1988, a few days after her daughter signed for it. The only corroborating evidence presented was the statement by her psychiatrist as to when she told him about the letter. As the Eleventh Circuit cogently put it, "[t]here is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless." *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982). Even if we accept Ms. Scholar's statements as fact, she still had 76-83 days in which to preserve her legal rights; Ms. Scholar offers no explanation as to why this was not sufficient time in which to commence her action.

Ms. Scholar has made no showing to justify invocation of the doctrine of equitable tolling. We find Ms. Scholar's Title VII civil action was filed after the 90-day statute of limitations expired and is, therefore, barred.

## *CONCLUSION*

We find Ms. Scholar's cause of action is foreclosed because she did not file her Title VII civil action in a timely fashion in accordance with the statutory requirements. As a result, we do not reach the other issues presented by Ms. Scholar on appeal. Further, we decline

to exercise jurisdiction over the state claims because the federal claims were dismissed before trial.[4]

The district court's grant of summary judgment to Pacific Bell is hereby affirmed.

**AFFIRMED.**

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[4] "When federal claims are dismissed before trial, . . . pendent state claims also should be dismissed." *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

[SEAL]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

TO: Aurelia Scholar
741 Glen Rd
Danville, CA 94526

October 26, 1988
Charge Number:
376870237

Aurelia Scholar
Charging Party

Pacific Bell
(Legal Dept)
Respondent

DETERMINATION ON REVIEW AND DISMISSAL
OF TITLE VII CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. Based upon this review, we agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute. Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in Federal District Court against the Respondent(s) named above within 90 days of receipt of this Determination.

IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE

RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On behalf of the Commission:
/s/ Leonara L. Guarraia
Leonara L. Guarraia
Director
Determinations Review
Program

Enclosure: Information Sheet on Filing
Suit in Federal District Court

cc: Rolland D. Taylor
Director
Oakland Local Office

Charlie Wong
Acting Director
San Francisco District Off.

## FILING SUIT IN FEDERAL DISTRICT COURT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000(e)

The Commission has determined that the evidence obtained during the investigation of your charge does not establish a violation of the statute. This determination completes our investigation and processing of your charge.

### PRIVATE SUIT RIGHTS:

Should you wish to pursue this matter further, you may do so by filing a lawsuit against the respondent named in your charge in U.S. District Court within 90 days of the date you received the determination. Once this 90-day period is over, your right to sue will be lost. Filing this notice is not sufficient. A court complaint must contain a short statement of the facts of your case which shows you are entitled to relief.

Your lawsuit must be filed in U.S. District Court. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

### ATTORNEY REPRESENTATION:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, at its discretion, assist you in obtaining a lawyer to represent you. If you plan to ask

the U.S. District Court to help you find a lawyer, you must make this request of the court in the form and manner it requires. Your request to the U.S. District Court should be made well before the end of the time period mentioned above. A request for representation does not relieve you of the obligation to file a lawsuit within this 90-day period.

You may contact the EEOC office where you filed your charge if you have questions abut your legal rights including advice on which U.S. District Court can hear your case, or if you need to inspect and copy information contained in the case file.

DESTRUCTION OF FILE:

Generally, EEOC's rules call for your charge file to be destroyed two years from now unless you have notified us that you have filed suit in U.S. District Court. If you file suit, you or your attorney should forward a copy of your court complaint to the office where you filed your charge within 10 days after you file suit. Your file will then be preserved.

(ENCLOSURE WITH DRP NO CAUSE LETTER OF DETERMINATION)